No. 80-1257

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD SCHRIVER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the construction industry proviso to Section 8(e) of the National Labor Relations Act privileges union signatory subcontracting clauses—*i.e.*, contract clauses barring subcontracting except to contractors who are signatories to agreements with particular unions—when they are sought in the context of a prehire agreement lawful under Section 8(f) of the Act.

2. Whether the construction industry proviso to Section 8(e) of the Act requires union signatory subcontracting clauses negotiated in the context of a collective-bargaining relationship to be limited in application to particular jobsites at which both union and nonunion workers are employed.

3. Whether the protection of the construction industry proviso is lost if a prehire agreement is obtained through picketing that does not exceed the limitations imposed by Section 8(b)(7) of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 635 F.2d 859. The decision and order of the National Labor Relations Board (Pet. App. 60a-110a) are reported at 239 N.L.R.B. 264.

JURISDICTION

The judgment of the court of appeals (Pet. App. 115a-116a) was issued on October 20, 1980. The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act") are set forth at Pet. App. 111a-114a. Also relevant is Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), which provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

STATEMENT[1]

1. a. Donald Schriver, Inc. ("Schriver") is a developer and general contractor in the building and construction industry which does business within the territorial jurisdiction of the Los Angeles Building and Construction Trades Council ("Trades Council")

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[1] The Board proceeding involves two cases (*Schriver* and *Topaz*), which were consolidated for purposes of decision. The facts in both cases were stipulated by the parties. (Pet. App. 61a-62a.)

and Local 1497, United Brotherhood of Carpenters and Joiners of America ("Local 1497"). Schriver employs only carpenters and a single laborer, and subcontracts all of its other jobsite work. (Pet. App. 7a.) In June 1972, Schriver and the Trades Council entered into "Articles of Agreement" ("the 1972 Agreement"), which incorporated by reference the terms set forth in the Master Labor Agreement ("MLA") between various employer associations and the Los Angeles County District Council of Carpenters ("District Council"), of which Local 1497 was a member (*ibid.*). The 1972 Agreement and the MLA contained provisions restricting the subcontracting of jobsite work to firms that were parties to current collective bargaining agreements with the signatory unions.[2] The subcontracting restrictions applied at "any time" and at "any jobsite where work within

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[2] For example, the 1972 Agreement provided, in pertinent part (Pet. App. 9a):

> The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work * * * to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

Similarly, a section in the MLA provided (*ibid.*):

> The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

the jurisdiction of the unions was performed," regardless of whether any union members "were present at that jobsite" (Pet. App. 9a). In addition, the MLA authorized the unions to take "any" action to enforce awards or resolutions obtained through the grievance and arbitration process.[3]

Although Schriver remained a party to the Agreement at all material times thereafter (Pet. App. 7a-8a), it did not employ union carpenters and did not require its jobsite subcontractors to employ union labor between June 1972 and May 1975 (Pet. App. 10a).[4] In May 1975, Schriver employed nonunion carpenters to work at its townhouse construction project in Montebello, California. Its other work was subcontracted to various firms, approximately 30% of which were nonunion. At certain times, some crafts worked at the project alone; at other times, many crafts worked simultaneously. (Pet. App. 10a.)

On May 22, 1975, Local 1497 Business Representative Jim Sogoian approached Schriver's Montebello jobsite superintendent and asked whether the carpen-

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[3] Section 306 of Article III of the MLA provided (Pet. App. 10a):

> Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof * * *.

[4] During that period, Schriver completed several construction projects without objection from the unions; there is, however, no evidence that the unions had notice of such projects (Pet. App. 10a).

ters on the job were "union." When the superintendent replied that they were not, Sogoian stated that Local 1497 would picket the jobsite unless Schriver signed the current carpenters' contract. (Pet. App. 10a-11a.)[5] During the negotiations that followed, representatives of Local 1497 and the District Council took the position that Schriver was bound by the 1972 Agreement to sign the current contract and twice again informed Schriver that its failure to do so would result in jobsite picketing. On June 20, Schriver filed with the Board unfair labor practice charges asserting that the subcontracting clauses contained in the contracts in question violated the proscription in Section 8(e) of the Act, 29 U.S.C. 158(e), against secondary agreements and that, therefore, the unions' threats to picket violated Section 8(b)(4)(ii)(A) of the Act, 29 U.S.C. 158 (b)(4)(ii)(A). (Pet. App. 11a, 60a.)[6]

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[5] That contract contained subcontracting clauses similar to those in the Agreement and the MLA (Pet. App. 11a); see note 2, *supra*.

[6] Section 8(e) of the Act, 29 U.S.C. 158(e), bans "hot cargo," or secondary, agreements between employers and unions. Section 8(b)(4)(A) of the Act, 29 U.S.C. 158 (b)(4)(A), makes it unlawful for a union to picket with an object of forcing an employer "to enter into any agreement which is prohibited by section 8(e)." However, a proviso to Section 8(e) exempts from its prohibition "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *." Accordingly, in the construction industry, the legality, under Section 8(b)(4)(A), of picketing to secure a "hot cargo" agreement turns on the question whether the agreement is protected by the Section 8(e) proviso. See note 10, *infra*.

b. In February 1977, Topaz Contracting and Developing Co., Inc. (Topaz), a framing contractor doing business within the territorial jurisdiction of Local 1752, United Brotherhood of Carpenters and Joiners of America ("Local 1752") and the District Council, began carpentry work on a townhouse project in Claremont, California. All crafts on the project were "union" except for the 30 to 50 workers employed by Topaz, which has never been a party to a labor agreement with any labor organization. (Pet. App. 11a-12a.) On February 22, Local 1752 Business Representative Larry Ruiz approached Topaz's construction foreman and asked why Topaz had not signed up with the union. Ruiz stated that the union would picket the jobsite if Topaz did not sign the current carpenters' contract. During the negotiations that followed, a labor relations consultant employed by Topaz asserted that the contract in question was "illegal," but that Topaz would be willing to sign it if its terms were limited to the Claremont jobsite only and if the union would accept all of Topaz's present employees. Ruiz replied that such conditions were unacceptable and that he could sign only the standard agreement. (Pet. App. 12a.)

In support of its contract demands, Local 1752 and the District Council picketed the Claremont project for 10 days commencing March 4. The placards read:

Topaz Contracting & Dev.
UNFAIR
to
Carpenters
Local 1752
Affiliated with the
Los Angeles Building and Construction
Trades Council
No Agreement

At the time of the picketing, Topaz had 12 employees on the project. Other employers working at that time included a plumbing subcontractor, employing union plumbers and helpers, and a brick subcontractor, employing union brick masons and helpers. On March 9, Topaz filed with the Board unfair labor practice charges asserting that the subcontracting clauses contained in the contracts in question violated the Section 8(e) proscription against secondary agreements and, therefore, that the unions' picketing and threats to picket in order to obtain the clauses violated Section 8(b)(4)(i) and (ii)(A) of the Act. (Pet. App. 12a-13a, 60a, 74a.)

2. The Board agreed with petitioners' contention that the union signatory subcontracting clauses sought by the unions were secondary in thrust and therefore violative of Section 8(e) of the Act, unless saved by the construction industry proviso to that section. The Board further noted that in a companion case, *Woelke & Romero*,[7] it had held that, under this Court's decision in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 633 (1975), the construction industry proviso only permits union signatory subcontracting clauses that are sought "in the context of a collective-bargaining relationship" (Pet. App. 81a).[8] The Board,

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[7] *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)*, 239 N.L.R.B. 241, 248-250 (1978), enforcement denied in relevant part *sub nom. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *NLRB*, 609 F.2d 1341 (9th Cir. 1979), rehearing en banc granted, Nos. 78-3469, *et al.* (9th Cir. Aug. 30, 1980).

[8] In *Woelke & Romero, supra*, the Board added that, under *Connell*, such clauses are privileged "possibly even without [a collective-bargaining] relationship if the clauses are aimed

however, rejected petitioners' argument (Pet. App. 87a) that only a bargaining relationship between an employer and a representative of a majority of the unit employees within the meaning of Section 9(a) of the Act, 29 U.S.C. 159(a), would satisfy the *Connell* test. Rather, the Board determined (Pet. App. 88a-91a) that the contracts in question—which were "complete * * *, setting forth wages and other terms and conditions of employment for [petitioners'] employees" (Pet. App. 83a) and which constituted lawful "pre-hire" agreements under Section 8(f) of the Act[9]—provided a sufficient "collective-bargaining relationship" to meet the requirements of *Connell*.

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at avoiding the *Denver Building Trades* problem[,]" *i.e.* the friction created by having union and nonunion employees working together on the same jobsite. 239 N.L.R.B. at 250. See *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100, supra*, 421 U.S. at 629-631.

The Board also concluded in *Woelke & Romero*, that where union signatory subcontracting clauses are sought in the context of a collective-bargaining relationship, they need not be limited to particular jobsites on which union and nonunion employees are working together in order to be privileged under the proviso. 239 N.L.R.B. at 248-250.

[9] Section 8(f) of the Act, 29 U.S.C. 158(f), provides, in pertinent part, that it shall not be an unfair labor practice

> for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (*or who, upon their employment, will be engaged*) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 U.S.C. 159] prior to the making of such agreement * * *. [Emphasis added.]

The Board also concluded that the picketing of Topaz for the purpose of securing the subcontracting clauses in a Section 8(f) context did not "impair the effectiveness of the relationship for purposes of applying proviso protection" (Pet. App. 86a). The Board acknowledged that such picketing is equivalent to recognitional picketing and is thus subject to the limits of Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), which provides in pertinent part that it shall be an unfair labor practice for a union to picket for recognitional or organizational purposes for more than a reasonable period of time, not to exceed 30 days, without having filed a petition for a representation election with the Board (Pet. App. 86a, 90a). The Board noted, however, that the 10 days of picketing at the Topaz jobsite did not exceed the Section 8(b)(7)(C) limitations. Relying on settled law, the Board also observed that picketing to secure a subcontracting clause privileged by the construction industry proviso of Section 8(e) does not violate Section 8(b)(4)(A) of the Act. (Pet. App. 86a & n. 19.)[10]

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[10] The Board and the courts have held that picketing to obtain a subcontracting agreement which is privileged by the construction industry proviso to Section 8(e) of the Act does not violate Section 8(b)(4)(A)'s ban against economic pressure to force an employer "to enter into any agreement which is prohibited by Section 8(e)." However, since Congress did not intend subcontracting agreements privileged by the construction industry proviso to be enforced by means that would violate Section 8(b)(4)(B) of the Act (see H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959)), the Board and the courts have further held that picketing to obtain such a subcontracting agreement violates Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B), where it also has as an object causing a cessation of business between the general contractor and an existing and identified nonunion subcontractor. See *Northeastern Indiana Bldg. & Constr. Trades*

However, the Board (with two Members dissenting) found that the subcontracting clauses lost the protection of the proviso because of Section 306 of Article III of the MLA (note 3, *supra*), which permitted the unions to resort to economic action if signatory employers failed to comply with grievance-arbitration decisions on any grievable subject, including the subcontracting restriction.[11] Accordingly, the Board found that Local 1497 and the Trades Council violated Section 8(b)(4)(ii)(A) of the Act by threatening to picket Schriver with an object of requiring it to reaffirm the Master Labor Agreement and violated Section 8(e) by again entering into that agreement with it. Similarly, it found that the District Council and Local 1752 violated Section 8(b)(4)(i) and (ii)(A) of the Act by picketing Topaz with an object of requiring it to sign the MLA. (Pet. App. 92a-98a.) The Board ordered the unions to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 99a-104a).

3. The court of appeals sustained the Board's decision. The court agreed that this Court's decision in *Connell* holds that the construction industry pro-

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Council (Centlivre Village Apartments), 148 N.L.R.B. 854, 856-858 (1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636, 641 (3d Cir. 1964); *Constr., Prod. & Maintenance Laborers Union, Local 383* v. *NLRB*, 323 F.2d 422, 425 (9th Cir. 1963).

[11] A subcontracting agreement loses the protection of the construction industry proviso if it contains terms that sanction strikes or other self-help measures in the event subcontracting in violation of the agreement occurs, because carrying out such measures would violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *Bricklayers & Stone Masons Union, Local No. 2* v. *NLRB*, 562 F.2d 775, 787-788 (D.C. Cir. 1977). See also note 10, *supra*.

viso of Section 8(e) generally applies only to those subcontracting clauses that are sought "in the context of collective-bargaining relationships" (Pet. App. 27a). The court further agreed that Section 8(f) pre-hire agreements—such as those in the subject case—establish such a context. Observing that Section 8(f) represented a congressional effort to adjust the Act to the unique structure of the employment relationship in the construction industry and that prehire agreements "provide[] the very means by which unions and employers typically initiate a bargaining relationship in th[at] * * * industry" (Pet. App. 28a), the court concluded that "[t]here is no reason why Congress would *protect* subcontracting agreements in the construction industry under § 8(e), and at the same time *prohibit* the most common and possibly the only effective means by which such an agreement may be obtained" (Pet. App. 33a; emphasis in original).

The court also rejected petitioners' contention that the subcontracting clauses were void because they were not restricted in application to particular jobsites and particular times at which petitioners had union members present. The court explained that the legitimate purpose of subcontracting clauses was not only to "avoid 'friction' on the jobsite that may arise when both union and nonunion workers are present," but also "to protect contract standards in the construction industry"—a goal that would be "unattainable in that industry if subcontracting agreements were not allowed" (Pet. App. 44a).

Finally, the court rejected (Pet. App. 18a-19a n.11) petitioners' argument that picketing to obtain a Section 8(f) contract is altogether proscribed by the Act. The court found that the congressional intention

to limit coercion in securing such contracts was effectuated by Section 8(b)(7)(C), which limits such picketing to a "reasonable period of time not to exceed 30 days," absent the filing of a representation petition pursuant to Section 9(c) of the Act, 29 U.S.C. 159(c). Because the coercion employed by the unions here—a threat to picket Schriver and 10 days of picketing at the Topaz jobsite—did not contravene those limits, the court agreed with the Board that such conduct did not deprive the unions of the protection of the proviso to Section 8(e).[12]

ARGUMENT

Although the issues decided by the court below are of importance in the application of the National Labor Relations Act to the construction industry, the court's decision is correct and is not inconsistent with the decisions of any other circuit.[13] Review by this Court is therefore unwarranted.

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[12] The court, however, sustained the Board's finding that the subcontracting clauses fell outside the protection of the proviso, and thus violated Section 8(e) of the Act, insofar as they authorized the unions to use economic action to enforce the clauses; and the court enforced the Board's order in this regard (Pet. App. 57a-59a). The petition does not raise any question concerning this aspect of the court's decision.

[13] The decision in *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *NLRB*, 609 F.2d 1341 (9th Cir. 1979)—which held, contrary to the court below, that subcontracting clauses are valid under the construction industry proviso only insofar as they apply to jobsites and times at which the employer or his subcontractor has union members present—does not create a conflict that warrants resolution by this Court at this time. For, on August 19, 1980, the Ninth Circuit, pursuant to the Board's petition, ordered rehearing en banc in that case. Argument was heard by an 11-member court on October 16, 1980, and the case is under advisement.

1. It is clear that the construction industry proviso to Section 8(e), read literally, would privilege the subcontracting clauses at issue here, for those clauses undeniably constitute "agreement[s] between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure, or other work * * *." Section 8(e), 29 U.S.C. 158(e). In *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), however, this Court held that the proviso was not to be read literally, but rather "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." *Id.* at 628. In that case, the union had picketed certain general contractors, including Connell, for the sole purpose of compelling the contractors to agree to subcontract only to firms signatory to a current union bargaining agreement. The union had no interest in representing Connell's employees; indeed, Connell employed no workers of the type whom the union represented. Since the union's picketing had no recognitional or organizational purpose, it fell outside the restrictions that Section 8(b)(7) places on recognitional and organizational picketing. See *Dallas Bldg. & Constr. Trades Council* v. *NLRB*, 396 F.2d 677, 682 n. 8 (D.C. Cir. 1968) ("picketing is permissible [under Section 8(b)(7)] if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractors' own employees"). Accordingly, the only possible restriction on the union's picketing in *Connell* was Section 8(b)(4)(A), which precludes picketing to obtain "any agreement which is prohibited by Section 8(e)."

The union argued in *Connell*, however, that the agreement it sought was protected by the construction industry proviso to Section 8(e) and that therefore the picketing did not violate Section 8(b)(4)(A). Had the Court accepted this argument, the union would have altogether avoided the restrictions on picketing carefully constructed by Congress in Sections 8(b)(4) and 8(b)(7). Construction unions would then have enjoyed virtually the same rights that garment workers' unions have under the second proviso to Section 8(e) to engage in "top-down" organizing and in unlimited picketing to obtain secondary subcontracting agreements outside of any contemplated collective-bargaining relationship between the picketing union and the employer.[14]

The Court declined to read the construction industry proviso as broadly as the union urged, "[a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing * * *." 421 U.S. at 633. Accordingly, it construed the construction industry proviso exemption as applicable "only to agreements in the context of collective-bargaining relationships * * *" (*ibid.*). The Court thereby assured that picketing for secondary subcontracting clauses could not be used as an unlimited means for "top-down" organizing. Picketing to obtain a collective-bargaining agreement

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[14] The second proviso to Section 8(e) privileges secondary subcontracting agreements in the garment industry, and unlike the construction industry proviso exempts efforts to enforce those agreements from the prohibitions of the Act, including Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B). See *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974).

containing a secondary subcontracting clause would be restricted under Section 8(b)(7)(C) to a reasonable period, not to exceed 30 days, unless the picketing union had filed an election petition;[15] and picketing to obtain a secondary subcontracting clause not in the context of a collective-bargaining relationship would be proscribed altogether by Section 8(b)(4)(A).[16]

2. In the present case, the unions were not the designated bargaining representative of a majority of either Schriver's or Topaz' employees; thus the subcontracting agreements were not sought in the context of a Section 9(a) collective-bargaining relationship, but rather as part of a Section 8(f) prehire agreement between the unions and the employer-contractors. Petitioners contend (Pet. 27) that a Section 8(f) relationship is not sufficient to satisfy the collective-bargaining relationship requirements of

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[15] See *Bldg. & Constr. Trades Council of Philadelphia (Samuel E. Long, Inc.)*, 201 N.L.R.B. 321, 323-325 (1973), enforced mem., 485 F.2d 680 (3d Cir. 1973), cert. denied, 416 U.S. 937 (1974).

[16] The Court did suggest one possible exception to the proscription against secondary subcontracting agreements outside of a collective-bargaining relationship, noting that, "in light of congressional references to the *Denver Building Trades* problem," the protection of the Section 8(e) proviso extends "possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. In *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), the Court had held that each contractor at a construction site should be considered as a separate employer for secondary boycott purposes, thereby denying legal significance to the reality of the close relationship between contractors and subcontractors at the jobsite and severely limiting the economic pressure that unions could use to assert their interests in having jobsite work performed by unionized employers.

Connell—that such requirements can be satisfied only if the union demanding the subcontracting agreement is "the certified bargaining representative or otherwise legally entitled to the presumption of a majority status." The Board and the court below properly rejected this contention.

Section 8(f) was enacted in 1959 because of the peculiar nature of employment and collective bargaining in the building and construction industry. Thus, as the Senate Report explained (S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959)):

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.

For these reasons, and because the practice of signing such agreements was "not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired" (*ibid.*), Congress added Section 8(f) to the Act.[17] That provision authorizes employers in the construction industry to enter into comprehensive agreements with labor organizations that have not established majority status in the manner provided by Section 9 of the Act. As

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[17] The history of Section 8(f) is summarized in *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 348-349 (1978).

the court below correctly concluded (Pet. App. 33a; emphasis in original):

> The same Congress that adopted § 8(f) in 1959 added to the newly enacted § 8(e) a proviso that expressly authorizes subcontracting agreements in the construction industry. There is no reason why Congress would *protect* subcontracting agreements in the construction industry under § 8(e), and at the same time *prohibit* the most common and possibly the only effective means by which such an agreement may be obtained. We hold, therefore, that a subcontracting agreement sought in the context of an 8(f) prehire agreement does not violate § 8(e).

To conclude that a prehire agreement, no less than an agreement with a union which has established its majority status, qualifies for the protection of the construction industry proviso to Section 8(e) does not ignore the thrust of the *Connell* decision. As the court below explained (Pet. App. 33a-34a):

> *Connell* required a collective bargaining relationship to guarantee that a union seeking a subcontracting agreement could not sidestep § 8(b)(7) and apply unlimited secondary pressure on nonunion subcontractors. An attempt by a union to establish an 8(f) relationship is sufficient to satisfy that concern; a union seeking an 8(f) agreement covering wages and other terms of employment remains subject to the restrictions of § 8(b)(7). *Dallas Building and Construction Trades Council* v. *NLRB*, 396 F.2d 677 (D.C. Cir. 1968). * * * [18]

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[18] The court further noted (Pet. App. 29a):

> [T]he unions in the present case explicitly sought to *secure* representation of Schriver's and Topaz'[s] em-

3. Petitioners further contend (Pet. 41-44) that the subcontracting clauses are void because they are not limited in application to particular jobsites and particular times at which the general contractor or its subcontractors have union members present. The court below correctly concluded (Pet. App. 36a-50a) that neither the construction industry proviso itself, nor the "statutory setting and the circumstances surrounding its enactment" (*Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100, supra*, 421 U.S. at 628) supports such a restriction.

a. The language of the proviso contains no limitations such as those proposed by petitioners. Instead, the proviso broadly authorizes agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." Section 8(e), 29 U.S.C. 158(e). The agreements in the present case thus plainly fall within the literal protection of the proviso.

The legislative history of the proviso, moreover, is consistent with this construction. As this Court recognized in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 634-637 (1967), the 1959 Congress believed that, under then-existing law (see *Local 1976, United Brotherhood of Carpenters Union* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958)), it was not unlawful for employers and unions voluntarily to enter into "hot cargo" agreements. Congress, regarding this as an

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ployees. The unions sought to enter into a complete agreement with the contractors, covering the wages, benefits, and other conditions of employment of the contractors' own employees. Their primary goal was not to apply organizational pressure on *other* firms, but to standardize the working conditions of the employees of these contractors. * * * [Emphasis in original; footnote omitted.]

undesirable "loophole" in the protections against secondary boycotts (*NLRB* v. *Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507, 517 (1977)), moved to close it. The Senate version of Section 8(e) would have made it an unfair labor practice only for employers in the trucking industry to agree to boycott the products of any other employer. See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959). The House amended the bill to make it an unfair labor practice for *any* labor organization and *any* employer to enter into such an agreement. The conference committee adopted the House amendment, but added three provisos, one of which was the construction industry proviso. *Ibid.*

With respect to that proviso, Senator Kennedy, the Chairman of the Conference Committee, reported back to his colleagues that the Senate "insisted upon a qualification * * * for agreements relating to work to be done at the site of a construction project[,]" and he noted that this change was "necessary to avoid serious damage to the pattern of collective bargaining in [the industry]." 105 Cong. Rec. 17899 (1959), 2 *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* ("2 *Leg. Hist. LMRDA*") 1432. He added (105 Cong. Rec. at 17900, 2 *Leg. Hist. LMRDA* 1433):

> The first proviso * * * is intended to preserve the present state of the law * * * with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> * * * * *
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). * * *

In sum, the legislative history makes it clear that "the construction industry proviso to § 8(e) was intended to preserve the pattern of collective bargaining in the construction industry as it existed prior to 1959 and the enactment of § 8(e)" (Pet. App. 40a-41a).

b. As the court below observed (Pet. App. 42a), a Department of Labor study of subcontracting provisions in collective-bargaining agreements in effect in 1959 established that provisions such as those at issue in this case were then prevalent in the construction industry, and "not one agreement was found to limit the applicability of the subcontracting restriction to particular jobsites at which both union and nonunion workers were employed" (citation and emphasis omitted). See also Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 Monthly Lab. Rev. 14, 19 (1950). Accordingly, the Board and the courts have, since 1959, repeatedly upheld subcontracting clauses not limited to particular jobsites. See cases compiled in *Carpenters Local 944 (Woelke & Romero Framing, Inc.)*, *supra*, 239 N.L.R.B. at 247-248 & n. 13.

c. Petitioners' contention that subcontracting agreements are protected by the construction industry proviso to Section 8(e) only when they are limited to particular jobsites and particular times at which union members are already employed is based—as was the now-vacated panel decision in *Pacific Northwest* (see note 13, *supra*) on which petitioners rely (Pet. 44-46)—on the premise that the proviso was merely intended to avoid the *Denver Building Trades* problem—*i.e.*, the friction on the jobsite that may arise when both union and nonunion workers are present. However, as the court below

recognized (Pet. App. 44a), subcontracting agreements serve a much broader and more fundamental purpose—i.e., protection of "contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements [of the type here] were not allowed."

Thus, because of the "temporary and transitory nature of employment in the construction industry," union workers are concerned not simply that "they will be replaced at the particular location at which they are working with nonunion workers," but that "the union-represented pool of workers to which they belong will be 'replaced' at future projects" (Pet. App. 45a). "Since the employee pool is not attached to a particular employer but to the industry as a whole, workers in the construction industry have no interest in forbidding 'contracting-out' altogether," but instead have a substantial interest "in assuring that their collective-bargaining agreement is respected on each jobsite upon which their employer works whether he does the work himself or subcontracts it out" (*id.* at 45a-46a.) Accordingly, to require subcontracting agreements to be renegotiated on a jobsite by jobsite basis, or limited in application to jobsites where union workers are already present, would subvert the primary purpose of subcontracting agreements in the construction industry. Moreover, as the court below noted (Pet. App. 46a), "it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite, a fact recognized by Congress in enacting § 8(f) in 1959." See S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959) (labor agreements in the construction industry "necessarily apply to jobs which have not been started and may not even be contemplated").

This Court's decision in *Connell* does not compel a different view. As shown (pages 13-15, *supra*), the Court in *Connell* was not dealing with a subcontracting agreement in the context of a collective-bargaining relationship, as here. Moreover, in referring to the *Denver Building Trades* problem, the Court decidedly did not, contrary to petitioners (Pet. 41), hold that a valid subcontracting clause must occur *both* in "the context of a collective-bargaining relationship" *and* with reference to a particular jobsite. Rather, in referring to jobsite friction, the *Connell* Court was simply positing an *additional* context in which such clauses might receive proviso authorization, *notwithstanding* the absence of the generally required "context of a collective-bargaining relationship." (See 421 U.S. at 635; see also note 8, *supra.*)

4. Finally, petitioners argue (Pet. 39-40) that the unions "violat[ed] Congress'[s] proscription against coercive attempts to obtain employer assent to prehire agreements" by picketing and threatening to picket the jobsites in the subject case. The legislative history of the 1959 amendments to the Act, however, does not support this argument. Rather it demonstrates that, although Congress did not intend Section 8(f) "to authorize the use of force, coercion, strikes or picketing to compel any [employer] to enter into such prehire agreements,"[19] Congress recognized that the provision did not, by its terms, limit the right of a union to strike or picket for such agreements.[20]

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[19] H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 41-42 (1959). See also citations to legislative history compiled in *Connell, supra,* 421 U.S. at 633 n. 12, and *NLRB* v. *Local Union No. 103, Iron Workers,* 434 U.S. 335, 348 n.10 (1978).

[20] 105 Cong. Rec. 18134-13135 (1959), 2 *Leg. Hist. LMRDA* 1721 (remarks of Rep. Thompson, member of Conference Committee and House floor manager).

Nor do the terms of the construction industry proviso to Section 8(e) restrict its protection to voluntary agreements. If coercion to obtain a prehire agreement containing a union signatory subcontracting clause is to be proscribed, it can only be through Sections 8(b)(4)(A) or 8(b)(7) of the Act.

Section 8(b)(4)(A), however, merely proscribes forcing an employer "to enter into any agreement which is prohibited by Section 8(e)." Subcontracting clauses coming within the terms of the construction industry proviso to Section 8(e) are, by the very terms of the proviso, not prohibited by Section 8(e). Both as a matter of logic and of settled law, picketing to secure clauses privileged by the proviso does not violate Section 8(b)(4)(A) (see cases cited at note 10, *supra*). And this is true regardless of whether the union has acquired majority status, for, as shown above (pages 15-17, *supra*), subcontracting clauses sought in the collective-bargaining context come within the proviso whether they are contained in a conventional agreement or in a prehire agreement authorized by Section 8(f).

Picketing to obtain a prehire agreement is, however, treated by the Board as unlawful recognitional picketing if it runs afoul of Section 8(b)(7)(C). See *Local 542, Int'l Union of Operating Engineers (R.S. Noonan, Inc.)*, 142 N.L.R.B. 1132, 1135 (1963), enforced, 331 F.2d 99 (3d Cir.), cert. denied, 379 U.S. 889 (1964); *Local 86, Brotherhood of Painters (Carpet Control, Inc.)*, 216 N.L.R.B. 1127, 1132-1133 (1975). See also *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 186 (1978) (picketing to secure prehire agreement "was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C)"); *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335 (1978) (picketing to enforce 8(f) contract is

subject to Section 8(b)(7)(C) restrictions). Thus, the Board's interpretation of the Act with respect to such picketing does not, as petitioners assert (Pet. 40), grant construction unions "unfettered coercive means" to obtain prehire agreements. It is, rather, a defensible interpretation of the statute that is "entitled to considerable deference." *NLRB* v. *Local Union No. 103, Iron Workers, supra*, 434 U.S. at 350. Under that interpretation, picketing to secure a prehire agreement is lawful only where, as here, there is a representation question capable of resolution under the Board's procedures and the union has not picketed beyond the 30 days specified in Section 8(b)(7)(C) without having filed a representation petition.[21]

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[21] As the court below noted (Pet. App. 19a n.11), both Schriver and Topaz "employed carpentry workers who were eligible to vote in a representational election"; accordingly, any picketing was clearly subject to the restrictions of Section 8(b)(7)(C).

The court below left open the question whether coercion to secure an 8(f) agreement would violate Section 8(b)(7)(C) from the outset where, "due to the fact that no workers are employed at the time of the picketing, a representational election is not possible" (Pet. App. 19a n.11). Cf. *Drivers, Chauffeurs, Warehousemen & Helpers Union, Local No. 71* v. *NLRB*, 553 F.2d 1368, 1374-1377 (D.C. Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 344499 309